IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 820 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JASHU VARSANG BARIA

Versus

STATE OF GUJARAT

Appearance:

MR VIKRAM J THAKOR for Appellant

MRS MANISHA L SHAH, APP for Respondent

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 31/07/2003

ORAL JUDGEMENT

1. This Appeal is preferred by the appellant against the judgment and order of conviction recorded by learned Asst. Sessions Judge, Ahmedabad (Rural) on 5th of

August, 2002, in Session Case No. 129 of 2001, convicting the accused under Sections 398 and 395 of the Indian Penal Code and sentencing the appellant for the rigorous imprisonment of 7 years and fine of Rs.1,000/in default, to undergo simple imprisonment of one year for the charges proved against appellant under Section 398 of the Indian Penal Code and sentencing the appellant to undergo rigorous imprisonment of two years and fine of Rs. 1,000/-, in default, to undergo simple imprisonment of one month for the charge under Section 395 of the Indian Penal Code proved against the accused - appellant.

2. The incident which culminated in conviction of the appellant occurred on 29.1.2001 in early hours of day about 2.00 to 2.30 hours. The incident occurred at village Meroli of the Ahmedabad District. PW-7 Dashrathbhai K. Patel who keeps cattle in the village, on the night of the incident, had been to take care of his cattle from his house to his vada, where he noticed that a group of persons 10 to 12 in number were attempting to break the lock open of the Bank of Maharashtra and the Ahmedabad District Bank, situated opposite to his residence. The persons of this group were dressed in shorts and were placed with the weapons like dharia and sword. He immediately went to the house of PW-5 Chimanbhai M.Patel. He was awaken and was informed about the attempt being made to break open the above two banks. Thereafter, complainant PW-1 Kirankumar Ratilal Patel was informed, and the village persons were gathered. Village persons were spread and cordoned the village to restrict the movements of such persons. There was stone throwing from such persons from the place of incident. Some of the village persons including PW-7 Dashratbhai were injured by such stone throwing. Thereafter, from the chowk of the temple of Goddess Kodiyar, a person was apprehended by village people who is appellant in the appeal and faced the trail as an accused. The appellant was injured in the head. The village persons informed the police and at about 2.15 hours PSO PW-9 Maganbhai Jyotiram on receiving information on phone from village Meroli that an attempt has been made at the village Meroli for looting the bank as aforesaid, he informed the Police Sub-Inspector, Asali Police Station at about 2.45 hours on 29.1.2001. PSI of Asali Police Station PW-8 Dharmendrasinh S. Chauhan on receiving the information from PSO immediately with the police staff reached at village Meroli and a complaint came to be recorded of complainant Kirankumar Ratilal Patel PW-1 at about 4.30 hours on 29.1.2001. The crime was registered at Asali Police Station. On the strength of this complaint, PW-9 prepared a panchnama of scene of

offence, arrested the accused on 12.30 hours on 29.1.2001 by panchanama. Thereafter, entrusted the investigation to another Police Sub-Inspector Rasikbhai V. Mandasana PW-10. After the investigation was over, a charge sheet came to be filed against the present appellant under Section 395, 398, 337 and 511 of the IPC, and for the charges under Section 135 of the Bombay Police Act. Learned Magistrate on submitting the charge sheet by the Police against the present appellant, committed the case to the Court of Sessions. The present appellant, according to the prosecution case, also informed the police about the names of other accused involved in the incident, therefore other accused are shown as non-traceable accused in the column of the charge sheet submitted against the appellant.

3. Learned Additional Sessions Judge, vide Exh.1, in the said Session Case No. 129/2001 framed charges for the offences punishable under Sections 395, 398, 337, 511 of the IPC and 135 of the Bombay Police Act, to which the appellants pleaded not guilty.

4. Prosecution examined 10 witnesses to prove the case of the prosecution. Out of them, PW-1 Kirankumar Rasiklal Patel, Exh.6, PW-3 Prashantkumar H. Patel, Exh.10, PW-4 Gokabhai Khodabhai Exh.11, PW-5 Chimanbhai Hathibhai Patel, Exh.12 and PW-7 Dasharathbhai S. Chauhan. In all 5 eye witnesses of the incident are examined by prosecution. While PW-2 Exh.8 Arjanbhai Gagabhai Desai is panch of panchnama of scene of offence. Exh.13. PW-6 Atulbhai Naginbhai Patel is panch witness of panhnama of Exh. 63, by which the appellant came to be formally arrested by IO PW-8 Exh.16. The Investigating Officer Dharmendrasinh S. Chauhan of Asali Police Station, who received the information on phone, reached at village Meroli and recorded the complaint is examined as PW8, Exh.16. PW-9 Exh.17 Maganbhai J. Prajapati, is also a police witness, who was in-charge of Asali Police Station, when he received information on phone from village Meroli about the incident and conveyed the same to PW-8 Dharmendrasinh S.Chauhan. PW-10 Rasikbhai V. Mandasana, who is the second Investigating Officer of the case.

5. The prosecution also placed on record for consideration, documentary evidence i.e. complaint given by Kirankumar Ratilal Patel PW-1 at Exh.7, panchnama of scene of offence at Exh.9, arrest panchnama of appellant at Exh. 14, and yadi by which the appellant was sent to hospital for treatment at Exh.20 and a copy of entry of Station Diary of Asali Police Station at Exh.19.

6. After recording of the evidence and the statement of the appellant under Section 313 of the Criminal Procedure Code, and after hearing the learned Additional Public Prosecutor as well as the defence Advocate, the learned Additional Sessions Judge came to the conclusion that the appellant was guilty for the charges levelled against him under Sections 395 and 398 of the Indian Penal Code and was sentenced as aforesaid. No separate punishment was awarded for the charges under Section 511 of the IPC and 135 of the Bombay Police Act. It was directed that sentence of imprisonment awarded shall run concurrently and that the appellant will be entitled to benefit under Section 438 of the Criminal Procedure Code for the period for which he was under custody during trial. Being aggrieved and dissatisfied, this Appeal is filed by the accused.

7. The Appeal came to be admitted by this Court on 21.10.2002 but vide order dated 2.2.2002 the bail of the appellant was refused by this Court, and the appeal was directed to be listed for the final hearing in the month of February, 2003. The Appeal was heard finally.

8. Learned Advocate for the appellant Mr. Vikram J. Thakar submitted that the order of conviction impugned in this Appeal is bad on various grounds. The first submission he made was in respect of the date of incident. He submitted that some of the witnesses stated that the incident occurred on 28th of January, some of the witnesses stated that the incident occurred on 29th January and one another witness stated that the incident occurred on 30th January and, therefore, the prosecution in the first place failed to prove the date of incident and this was the contradiction according to learned Advocate for creating doubt in the prosecution case. The next contradiction, which was urged, was in respect of clothes of the accused. It was submitted that almost all witnesses have stated that the mob of persons attempting to break open the lock, had worn shorts (chaddi and banian) while in arrest panchnama at Exh.14 of the appellant, he was found with shirt and pant. It was vehemently urged that none of the five eye witnesses proved beyond reasonable doubt the role played by the accused in committing the crime. None of the eye witnesses has seen the accused, according to prosecution evidence itself, committing the crime of breaking open the locks of the banks. It was also submitted that none of the witnesses say that the appellant was possessing a deadly weapon at the time of incident nor any weapon could be found from him when he was allegedly apprehended

by village persons. Therefore, according to the submission of learned Advocate Mr.Thakar for the appellant that there is no involvement on the part of the appellant in the incident as alleged by the prosecution. No specific role by the appellant could be proved in the commission of crime. The appellant was not even, as per the prosecution case, seen within the vicinity of the banks and, therefore, it was urged that if the prosecution case is taken as it is, involvement of the appellant in the alleged crime, could not be established beyond doubt by the prosecution. On submission, in respect of legal aspect of the matter, it was contended that, to prove the ingredients of Section 395, it is necessary for the prosecution to prove that theft or extortion has been committed, and while committing the said crime, any person is hurt or attempted to put in danger of hurt, learned Advocate for the appellant submitted that, there is no evidence even as per the prosecution case, and as per the panchnama of scene of offence that nothing is removed nor any property is removed from the above said two banks. Therefore, there was no theft committed and secondly no injuries were caused to the prosecution witnesses while committing the theft as envisaged by Section 395 of the Indian Penal Code. When no injuries to any person is proved by the prosecution, a case under Section 395 cannot be said to have been proved by the prosecution though the witnesses deposed that some of the village people received injury in stone throwing, but no medical evidence to corroborate the say of the witnesses is produced by prosecution and, hence, according to learned Advocate for the appellant, the charge and conviction against the present appellant under Section 395 cannot be sustained. It was also contended that so far as Section 398 of the Indian Penal Code is concerned, there is no evidence at all to even indicate that the appellant was located with any arm or deadly weapon so as to constituted an offence under Section 398. Nothing was recovered from him and, therefore, no case under Section 398 is made out against the present appellant. It was contended therefore that on the submission made on the facts as well as on law, the Appeal is required to be allowed and judgment and conviction be set aside.

9. Learned APP Mrs. Manisha L. Shah has vehemently and forcibly argued that Section 391 of the Indian Penal Code makes it clear that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or

more, every person so committing, attempting or aiding, is said to commit 'dacoity'. It was argued that it is not necessary to establish an offence under Section 391 to actually move the property from one hand to other hand within the terms of Section 390 of the IPC. Even attempt to commit a docoity is punishable under Section 395 and the persons when five or more in numbers commits the robbery, their mere presence would be amounting to aiding such commission or attempt to commit the robbery. It was, therefore, argued that it is not necessary at all for the prosecution to prove that the appellant had stolen any property actually or that the appellant was having deadly weapons. It was argued that it was sufficient for the prosecution to prove that five or more persons attempted to commit robbery to constitute offence of docoity and the specific role of each member of such an assembly would not require to be proved. It is enough to prove that the particular accused was the member of such an assembly present at the spot. According to learned APP, sufficient evidence has been led by the prosecution to establish the case against the appellant under Section 395 of the IPC. It is also submitted that according to witnesses, the members of the group were having the weapons like dharia, sword etc. In spite of the fact that no weapon was recovered from the appellant, the appellant is rightly made liable under Section 397 of the IPC by virtue of Section 391 of the IPC as said above. It was argued that the incident has occurred at 2.00 hours or 2.30 hours in early morning of 29.1.2001. The FIR of the offence was promptly lodged at 4.30 hours of the same day before the Police Sub-Inspector of Aslali Police Station. The witnesses especially eye witnesses PW-1 Kirankumar Ratilal Patel, PW-3 Prashantkumar H. Patel, PW-4 Gokabhai Khodabhai and PW-5 Chimanbhai H. Patel and PW-7 Dasarthbhai are the eye witnesses of the incident, and extremely independent witnesses who have no grievance against the present appellant. There is nothing on the record to disbelieve them. The witnesses have immediately informed the Aslali Police Station and Police has taken immediate steps to reach to village Meroli. It was also urged that the name of the accused was disclosed before PSI Investigating Officer at 4.30 hours and the name of the accused was correct. The fact so stands true that he offered some other names of the accused. It was further contended that an attempt was made by a group of persons to break open Ahmedabad District Cooperative Bank and Maharashtra Bank. PW-7 Dashrathbhai K.Patel is staying just opposite Ahmedabad District Cooperative Bank. When attempt was made by the witnesses to intercept those group of persons breaking open the banks, the assembly attempted to ran away from

the spot, while a group was fleeing, the present accused was caught hold of amongst that group near the bank premises. Therefore, there is sufficient and reliable evidence adduced by the prosecution to bring home the charge against the accused appellant under Sections 395 and 398 of the IPC. It was argued that committing or attempting to commit docoity and on intercepting by the witnesses, running away from the group of persons, is a continuous act and during this process, there was stone throwing and injuries were caused to some of the village people. Therefore the act done by the appellant is fully covered by Section 391 of the IPC, so as to invite punishment under Sections 395 and 398 of the IPC as contended. It was also argued that the appellant belongs to Panchmahal District. There was no reason for him to be in village Meroli at late and odd hours of the night. In statement under Section 313, the accused appellant has not offered any explanation as to his presence at village Meroli at the time of commission of offence nor any justification offered by him to the village persons or to the police officers about his presence in village Meroli at 2.00 hours of the night. In respect of contradictions as highlighted by learned advocate for the appellant in respect of time and presence of the accused, it was stated that the offence has taken place on early hours of 29.12.2001 and normally and ordinarily those hours would be attached by the ordinary persons to be the late night hours of the earlier day and on that count some of the witnesses have said that the incident had occurred on 28.1.2001. Meaning thereby that on late hours of 28.1.2001, according to learned APP, this contradiction is insignificant. So far as contradiction to the presence of the accused is concerned, my attention was drawn to the evidence of PW-5 Chimanbhai H. Patel, who has stated that the accused and a group of persons wearing shorts and banians while pant and shirts were tide around waist. The case of the prosecution, as contended, cannot be disbelieved on the ground that the witnesses described the dress of the appellant to be short and banian at the time of the commission of offence and while arrest panchnama he was found in pant and shirt. The reasonable explanation, according to learned APP is found from the evidence of PW-5 Chimanbhai, as above said. It was contended that the witnesses of the scene of offence are credible, independent, and having no enmity with the accused when they deposed that the offence took place at certain time, in certain manner and at certain place, then their evidence ordinarily be accepted. In this respect, learned APP cited a decision of the Apex Court in the matter of STATE OF U.P. vs. RASID & ORS., reported in JT 2003 (5) SC 50, wherein the

Apex Court accepted the evidence of eye witness in respect of time of occurrence of the incident which on probability was shrouded with doubt on account of medical evidence and the said fact was taken into consideration by the High Court so as to discard the evidence of a witness in respect of occurrence of incidence. The Apex Court observed that when neighbour and three independent prosecution witnesses deposed to a fact and when their presence at the place of incident was not challenged, the High Court erred in ignoring the acceptable evidence and proceeded on probabilities. Reverting to the facts of this case, learned APP contended that all the eye witnesses - five in numbers, have deposed that the incident had occurred at 2.00 to 2.30 hours in the early morning on 29.1.2001 and when documentary evidence supports, it cannot be said that the prosecution failed to prove the date on which the incident occurred. It was therefore urged that by the above said reliable evidence, it is established by the prosecution that the appellant was the member of the group attempting to commit docoity in respect of banks, the Appeal requires to be dismissed.

10. Having heard rival contentions and going carefully through the testimonial collections adduced by the prosecution and the documents produced, the argument on behalf of the appellant that the offence under Sections 395 and 398 of the IPC is not made out when no property is either actually stolen or extorted from the victim has no substance. Section 391 of the IPC makes it amply clear that when five or more persons conjointly commit or attempt to commit a robbery, will be liable to punishment under Section 391, even if any member of such assembly was merely present and no overt act or role is attributed to a particular member. By virtue of Section 391 of IPC such member would make himself render liable for committing or attempting to commit docoity. Likewise, if some of the members of such assembly as mentioned in Section 391 of the IPC are lashed with deadly weapons, the members who are not armed with such weapons would render themselves liable for punishment under Section 398 of the Indian Penal Code. Therefore, the factual scenario taken place at the time of committing crime alleged and revealed through the evidence of witnesses is carefully required to be re-appreciated and scrutinised particularly on the following facts.

(i) Whether the prosecution proved beyond doubt that the appellant was the member of the assembly of the group of persons attempting to break open the doors of the banks at village

Meroli; (ii) the second aspect would be whether prosecution proves beyond doubt that the appellant was apprehended amongst the group of person attempting to break open the doors of bank and (iii) how and from where the appellant was caught and apprehended?

11. The prosecution examined five eye witnesses of the incident. Those important eye witnesses are PW-1 Kirankumar Ratilal Patel, Exh-6, who gave complaint. PW-3 Exh.10 - Prashantkumar H.Patel, PW-4 Gokabhai Khodabhai, Exh.11. PW-5 Chimanbai Hathibhai Patel, Exh.12 and PW-7 Dashrathbhai K. Patel, Exh.15.

12. The evidence of these five witnesses was re-appreciated and scrutinised in respect of Point No.1 above, though it clearly appears to have been proved by the prosecution that a group of persons having dressed in chaddi and banian lashed with weapons like dharia and sword were attempting to break open the lock and bolts of the doors of Maharashtra Bank as well as Ahmedabad District Cooperative Bank, any of the witnesses could not establish that the appellant was one of the member of the said group. According to the evidence of PW-1 Kirankumar Ratilal Patel, who is a complainant, on informing him by Dashrathbhai on telephone he himself, Dashrathbhai, Chimanbhai, Prashantkumar, etc were gathered and chased the accused. It is on appreciating of the evidence, it is clear that when witnesses say that they chased the accused, necessarily mean that they chased the group of persons who were attempting to break open the lock and doors of the Banks and not the present appellant categorically and specifically. It is stated by him that he had seen the accused persons. Meaning thereby that a group of persons who were opening the lock of the doors of the banks and on seeing them, the group fled away and they chased the said group. Then, there was stone pelting from them. Witness Chimanbhai was slightly injured. In whole of his evidence, nowhere he has stated that the appellant was one of the member of the said group who was breaking open the lock or was present in the group of person when some members were breaking open the doors of the bank, though he has stated that he chased the accused persons and appellant was caught near the temple of Goddess Kodiyar, it is not categorically established in his deposition that the appellant was also fleeing away as a member of such group and was amongst them. While other important witness PW-3 Prashantkumar H. Patel deposed that at the instance of Hashmukbhai he was awaken and came to know that some persons are attempting to break open the doors of banks in the

village. They made small groups of the village persons and the docoits thereafter ran towards village Timba road. He stated to that extent that the docoits had scuffled with them and then they started stone pelting. In his examination in chief, it is nowhere stated by him that the appellant was the member of the group of docoits as seen by him. On the contrary, in his examination in chief, once he deposed that he had not seen that the appellant was breaking open the lock. In the cross-examination, again this witness states that he had not seen the group of persons breaking upon the lock of the banks. The positive evidence of this witness denotes that this witness had not seen the group of docoits attempting to break open the lock nor positively suggests that the appellant was one of the member present even in the said group of docoits at the time of attempting to commit docoity in respect of two banks or while running away from the spot.

13. Witness PW-4 Exh.11 Gokabhai Khodabhai is also an eye witness of the incident. He is the witness residing near the bank. At the time of incident he had not slept. According to his deposition, the accused were breaking open the lock of Maharashtra Bank. It again be noted that in this context when witness refers to accused, the witness refers to the mob of docoits who were attempting to break open the lock of Maharashtra Bank. He further stated that they were in all 12 persons and were dressed in shorts and banians. They were armed with dharia. He made phone calls to others. All were gathered and they made a cordon to catch hold of the docoits. Then, there was stone pelting from them. Witness Chimanbhai was slightly injured and the present appellant, according to witness, was apprehended near the temple. From the examination-in-chief, nowhere it could come out as to believe that the present appellant was one of the member of the docoit gang which was attempting to break open the lock of Maharashtra Bank. In his cross-examination, he had admitted that it was dark when the incident took place and he positively deposed that he was away from the scene of offence and was not in a position to say that what the group of persons was actually doing. He also admitted that he could not say that the present appellant was amongst the group breaking open the lock and bolts of Maharahstra Bank and he was also not able to say that the appellant was one of the members of the group of docoits. Had he seen this appellant amongst group, then he could have said that he saw the appellant to be a member of docoits gang attempting to commit docoity in the Maharashtra Bank. On the contrary, by positive evidence of this witness in cross examination, it clearly

transpires that he had not seen the incident clearly and closely. Witness Chimanbhai Hathibhai Patel, PW-5 Exh.12, is also an eye witness of the incident. When his evidence is scanned carefully, it is found that he was awakened by PW-7 Dashrathbhai K. Patel, who informed this witness that some persons were breaking open the locks and bolts of Ahmedabad district Cooperative Bank and Maharashtra Bank. Thereafter, on informing on phone to other village people, the persons gathered in the chowk. According to his deposition, on seeing the persons coming, the gang of docoits to whom this witness referred as accused, fled towards the pond of the village while running towards the direction they pelted stones and one such stone was struck to him at his waist. He further deposed that accused Jashu Varsang Baria appellant who is present in the court was caught by all of us and was handed over to the police. In his examination in cross, he has admitted that there was darkness but there were lights. He further deposed that the gang of docoits breaking open the shutters of the Banks was seen by him from a distance and therefore he could say that which accused was playing which role. The witness further says in cross-examination that the accused who is present in the court was standing with a weapon in his hands. From the evidence of Chimanbhai Hathibhai Patel also it is not positively established that the appellant was one of the member of the docoity gang which was attempting to commit docoity in the Maharashtra Bank. On the contrary, it comes out from his evidence that before the incident, the present appellant was not known to any of the witnesses. The impression which emerges from his evidence is he had seen a group of persons breaking open the shutters of Maharashtra Bank from a distance and therefore it was not possible at all for him to identify that the appellant was one of the member of the docoity gang. Meaning thereby that there is no positive evidence that the appellant was a member of the group of docoits gang attempting to commit docoity. So far as this witness is concerned, though there is a mention in the cross-examination of this witness is that the appellant who is present in the court was standing with a weapon in hand, but the said evidence lead us to nowhere. In view of the evidence of the witness scrutinised as a whole, it clearly emerges that from the evidence of this witness that it cannot be concluded that the appellant was the member present in gang of docoity while committing the offence.

14. The next important witness PW-7 Exh. 15 Dashrathbhai K. Patel, is a person who first in point of time, noticed that some unknown persons were trying to

break open the lock of Maharahstra Bank. It is the case of prosecution from his evidence that at the time of incident, he had been to take care of his cattle tethered in Vada and he noticed that the accused (group of unknown persons) dressed in shorts and banians, lashed with dharia and sword where attempting to break open the lock of the bank. The witness resided just opposite of Ahmedabad District Bank building. From there, he went to Chimanbhai's house, from there other persons were awakened. People gathered and cordoned the village. Accused (unknown persons) were scattered all over. The appellant was caught from the temple of Goddess Khodiyar. From his examiantion-in-chief though he says that he saw a group of persons breaking open the lock of the Banks positively he did not depose that the appellant was one of the said group. On the contrary, in his cross-examination, he positively suggested that he could not say that what the appellant was doing and further he positively stated in the cross-examination that he did not see the present appellant breaking the lock open of the bank. From the evidence of this witness also, it has not come out that the witness saw the appellant positively with the members of docoit gang. What is proved by the evidence of this witness is the group of persons were attempting to break open the lock of Ahmedabad District Bank as well as Maharashtra Bank, but it is not proved that the appellant was at that time the member of the said group.

15. Thus, to invite the responsibility under Sections 395 and 398 upon the appellant, when prosecution is bound to prove that the appellant was the member of the docoit gang, on re-appreciation of the evidence, as aforesaid, it clearly comes out that none of the above five eye witnesses was able to say that the appellant was the member of the docoit gang as seen by them which was attempting to rob both the banks, within the terms of Section 391 of the Indian Penal Code.

16. So far as next Points No. 2 and 3 above are concerned, it is necessary in the facts and circumstances of the case to prove the case against the appellant that the appellant was a member of the docoit gang fled away from the scene of offence by seeing the witnesses, and was caught red-handed "amongst the group of docoits" which was running away out of the village and therefore the evidence of the prosecution in respect of Points No. 2 and 3 i.e. whether prosecution proves beyond doubt that the appellant was caught amongst the group as a member of the said mob of docoits and the manner in which this fact is sought to be proved by the prosecution is

scanned thoroughly. It must be borne in mind that as disclosed by the evidence, according to the story which is revealed by PW-7 Dashrathbhai K. Patel who noticed the gang of docoits attempting to break open the locks and informed other residents of the village, it appears that many persons, residents of village, were gathered in the chowk. They tried to cordon the accused who were attempting to commit robbery in the banks, for that they formed small group of persons and scattered all four directions of the village. Seeing this process, the persons who were attempting to break open the Maharashtra Bank, started fleeing from the scene of offence and that time they also pelted stones towards village persons. Now, in this background, it is the case of the prosecution that the present appellant was apprehended in the chowk of temple Goddess Khodiyar. It is necessary to refer again to the evidence of witnesses of prosecution on this material aspect. If we turn to the deposition of PW-1 Kirankumar Ratilal Patel, in his deposition he stated that he chased the accused. At that time, the present appellant Jashu Varsang Baria was apprehended near the temple of Goddess Khodiyar. Now the question is who actually apprehended the appellant who was near the temple of Goddess Khodiyar. At least this witness says that the appellant was apprehended, but how and in what manner is not coming out from the deposition. Meaning thereby that in the second phase of the prosecution case, as revealed in the evidence, it is not established that the appellant Jashu Varsang Baria was caught and apprehended from amongst the group of the gang of docoits fleeing away from the scene of offence. It is also not clear from the evidence of PW-1 that who actually caught the appellant near the temple. Like wise, PW-3 eye witness Prashantkumr H. Patel in this aspect states that the remaining persons had ran away but one person out of that was caught and apprehended near the temple of Goddess Khodiyar, and on asking, he gave his name to be Jashu Varsang Baria. In his evidence also the witness states that the appellant was caught and apprehended near the temple of Goddess Khodiyar and remaining had fled away. From the evidence of this witness, it is clear that it is not the case of this witness that he apprehended the appellant out of the group of docoits fleeing away from the scene of offence nor it comes out from his evidence that the appellant was seen fleeing away from the scene of offence amongst that group and was apprehended by somebody. It is a general statement made by the witness that one person i.e. appellant was apprehended from amongst the gang of docoits. When we recall the evidence of other witnesses, it is the case of the prosecution that the persons were scattered in small

group to cordon the fleeing accused and, therefore, it is necessary for the prosecution to prove that how and in what manner the appellant was apprehended and by whom so as to link the appellant with the group of docoits, but this evidence is certainly not found from the evidence of PW-3 Prashantkumar H.Patel. While PW-4 Gokabhai Khodabhai also in respect of apprehending the accused stated only to the extent that the appellant Jashu Varsang Bariya who was present in the court was apprehended from the spot denoting that PW-4 was also not a witness of the apprehending of the appellant either from the spot of the offence or from the chowk of the temple. PW-5 Chimanbhai Hathibhai Patel, also stated in his deposition that the appellant Jashu Varsang Bariya who was present in the court, was apprehended and he was apprehended by all of them. This witness also is not clear about from where the accused was caught and by whom. A general statement is made that all of them apprehended the accused. This evidence would not lead to the conclusion that the appellant was a member of the docoits gang and was apprehended amongst the fleeing group of persons, who attempted to commit offence in the buildings of Banks. It is not the say of witnesses that the appellant was fleeing along with other members and was apprehended at the scene of offence by a particular village persons. This fact is required to be established because it is the prosecution case that village persons form small groups and cordoned and scattered all around the village and it is not the prosecution case that all the village persons went in one direction and the appellant was caught hold of by them amongst the group. Eye witness PW-7 Dashrathbhai K.Patel also stated that the appellant present in the court who was caught from the chowk of temple. Again from the evidence of this witness, nothing is coming out to establish that the appellant was fleeing away as a member of the docoit gang and was caught by a particular village person.

17. Therefore, firstly, none of the evidences of five eye witnesses, led us to the conclusion that the appellant was a member of the gang of docoit while committing the offence, and secondly the prosecution failed to prove that appellant being the member of docoit gang while fleeing from the scene of offence was caught red-handed. When it is not established by the evidence of eye witnesses that any of them noticed the appellant committing the crime or noticed the presence of the appellant at the scene of offence as a member of docoit gang, then the prosecution must establish a link, nexus, by cogent evidence between fact of apprehending the accused from the chowk temple and the fact that he was

the member of the docoit gang, which after committing crime was fleeing away and the appellant was member of such group and was caught red-handed amongst the group of docoits. Mere apprehending any person from any part of the village even soon after the incident, unless a link is established by cogent evidence to the crime, would not, ipso facto, fasten liability of a crime upon any person. On careful scrutiny, as said above, it is not established that appellant was the member of docoits attempted to commit the docoity in the banks and if the prosecution intends to rely upon the fact that soon after the committing of the crime, appellant was caught near the scene of offence, then, it must be proved beyond doubt that the appellant was the member of the said gang. When the evidence was carefully scanned, it is clear that the said link is missing between the fact of apprehending of the accused and he being the member of a docoit gang attempted to commit the crime. The only evidence which we noticed in this respect is appellant was apprehended from the chowk of temple and nothing beyond that. The fact of apprehending the appellant in the chowk of the temple would not by itself lead to irresistible conclusion that he was present in the said assembly as a member when gang of docoit attempted to commit robbery in the bank premises.

18. In this respect, it is also required to be appreciated that the place from where the accused is alleged to be apprehended is not the place of scene of offence. On going through the panchnama of scene of offence carefully, it is seen that the temple of Goddess Khodiyar is situated on the road leading to village Timba and the way in which it is described in the scene of offence panchnama, at least, it is clear that the temple of Goddess is not the place of scene of offence. Meaning thereby that it is not the case of the prosecution that the appellant was caught red handed at the spot of the crime and, therefore, in this respect if this panchnama Exh.9 is seen, it is clear that the temple is situated at little distance from the scene of offence. If some persons, may be unknown, is caught within the vicinity, of the scene of offence, then, in absence of the eye witness a count or clear established link between such persons with the crime committed, by mere fact that he was caught within the vicinity of scene of offence, would not fasten any liability of crime upon any person.

19. One more aspect which is required to be appreciated is, according to prosecution case, the incident occurred at 2.00 or 2.30 hours on 29.1.2001. The appellant was apprehended as per the prosecution case

and the police was informed immediately. PW-8 Dharmendrasinh S. Chauhan at Exh. 16 reached at village Meroli soon after the incident i.e. about 4.00 hours on the same day and about 4.30 hours an FIR also came to be recorded by PW-8, as given by PW-1. It is the case of the prosecution witnesses that the accused - appellant was handed over to the police even in the complaint which is recorded and produced at Exh.7, it is mentioned that the appellant was apprehended and was asked about his name, etc. by PW-8. Even then, the panchnama of the arrest of the accused was prepared at 12.00 or 12.30 hours of that day. Meaning thereby that actually, the police arrested the present appellant after almost 10 hours from his apprehending by the prosecution witnesses. It is not the say of the PW-8 that at 4.30 hours when the complaint came to be recorded, the appellant was handed over to the Police. The arrest panchnama which is at Exh.14, as aforesaid, prepared at 12.00 hours at village Meroli. Even the record shows that the accused came to be arrested by the Police at 12.00 hours on 29.1.2001. Then, the question is how the appellant was kept during this 10 hours. This explanation is not coming from the prosecution evidence.

20. Thus, when it is not proved beyond doubt that the appellant was the member of the docoit gang, when it is not proved that how and from where and by whom and in what manner, the appellant was actually apprehended, it cannot be said that the appellant was amongst the group of persons forming docoit gang as envisaged by Section 391 of the IPC. Irrespective of specific role to be attributed to the appellant because the same is not necessary and only the presence if proved, would be sufficient to visit conviction under Sections 395 of 398, the evidence of prosecution is found deficient, in this case to come to the conclusion that while committing the crime of robbery, the appellant was member of such docoits and as such he was apprehended. The prosecution must stand on its own leg to prove its case. It is not for the accused to explain that how he happened to be at the village Meroli at add hours of the night but it is for the prosecution to prove beyond doubt that the presence of the appellant in village Meroli was linked with the commission of crime and on that aspect, as appreciated above, there is no evidence at all.

21. This is not a case wherein the witnesses are not creditworthy or their evidence is not believed because they do not inspire confidence. This is not a case wherein the prosecution case suffers from infirmity on account of late filing of the FIR. This is also not a

case wherein the witnesses are labelled as unworthy of credit on account of any enmity with the accused. On the contrary, it appears that the witnesses to the extent they have deposed, are truthful and extremely truthful. Whatever they have seen is narrated in natural manner and, therefore, viewing from this angle, this is a case wherein the evidence of prosecution is found insufficient to establish case against accused. Had the witnesses of the incident seen that the appellant was a member of the group of dacoits, they must have stated so. Had any of the eye witnesses actually caught the appellant from the chowk of the temple, then the said witness must have stated so that he along with others caught the accused from the chowk of the temple, but the witnesses have not stated so, and from the deposition of witnesses, it is clear that none of the witnesses links the appellant with the gang of docoits who attempted to commit the crime. In all cases, when witnesses are truthful or FIR is lodged promptly or investigation is sincere, it cannot be said that the prosecution case is proved beyond doubt. These are necessary ingredients of the prosecution case. Above this, prosecution is required to prove that the accused and accused only committed crime. There may be cases when the prosecution case might not be suffering such infirmities and yet the evidence would not be sufficient to link the accused with the crime. The present case is one of them and as said above, this is not a case of unreliable witnesses or the prosecution case is discredited because of infirmities, but the evidence falls short to fasten the liability on the appellant on material ingredients of Sections 390 and 391 of the IPC, that is to say, from this evidence, even if it is taken to be true in all respect, the evidence falls short to establish that the appellant was a member of the gang of docoits committing robbery in the bank premises. Only evidence against the appellant is he was found near the temple soon after the incident though this circumstance may be unexplained by the appellant, the link which prosecution is duty bound to prove about the crime committed by the appellant could not be proved beyond doubt.

22. The learned Sessions Judge in the judgment impugned, however, fell into the error in appreciating the circumstances of the case firstly because it was assumed and presumed that there was no reason for the witnesses to falsely implicate the present appellant in the crime and that the accused appellant was found at village Meroli at odd hours of the night, the facts appears to have been weighed with learned Judge that the FIR is promptly filed by the complainant. The fact is

also erroneously appreciated by the learned Judge that the appellant was apprehended from the scene of offence and, therefore, with these assumptions, the learned Trial Judge appreciated the evidence and came to erroneous conclusion of convicting the accused for Sections 395 and 398 of the IPC.

23. In view of the above discussion, the Appeal is allowed. The judgment and order impugned in this Appeal convicting and sentencing the appellant in Session Case No. 129 of 2001, recorded by Assistant Sessions Judge, Ahmedabad (Rural) on 5.8.2002 is set aside and the appellant is acquitted of the charges levelled against him under Sections 395 and 398 of the IPC. If the appellant is not required to be detained in the Jail for any other purpose, the appellant be released forthwith by the Jail Authorities.

(J.R. Vora, J.)

p.n.nair